BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the matter of	)	
	)	
Revisions by Qwest Corporation	)	Transmittal No. 206
to Tariff F.C.C. No. 1	)	
	)	

PETITION OF TIME WARNER TELECOM TO REJECT, OR ALTERNATIVELY, SUSPEND AND INVESTIGATE

Pursuant to Section 1.773 of the Commission's rules, 47 C.F.R. § 1.773, Time Warner Telecom, Inc. ("TWTC"), by its attorneys, hereby files this petition in response to the tariff revisions proposed by Qwest Corporation ("Qwest") to its Tariff F.C.C. No. 1 in Transmittal No. 206. Qwest's Tariff F.C.C. No. 1 governs the rates, terms and conditions by which TWTC obtains special access services from Qwest. TWTC therefore has a direct interest in the tariff revisions.

I. INTRODUCTION AND SUMMARY

Qwest proposes in Transmittal No. 206 to raise many of its special access rates. TWTC demonstrates herein that the proposed increases in Qwest's Transmittal No. 206 result in rates that are neither just nor reasonable and, therefore, violate Section 201(b) of the Act. 47 U.S.C. § 201(b). Accordingly, the FCC should reject Qwest's tariff revisions. If the revisions are not rejected, the FCC should suspend and investigate the proposed revisions for the entire five month period permitted under Section 204(a) of the Act. 47 U.S.C. § 204(a). The Commission must also promptly commence a proceeding to establish appropriate constraints on future ILEC abuse of market power over special access transmission facilities.

II. DISCUSSION

Qwest's proposed increase in special access prices is unfortunately completely unsurprising. Current regulation (or lack thereof) leaves the ILECs almost entirely free to act on their incentives to engage in unreasonable and exclusionary pricing practices. Qwest is simply acting on those incentives. The result is proposed rates that are unreasonably high and that, if allowed to go into effect, will seriously undermine TWTC's and other competitors' ability to compete in the provision of dedicated and switched services to business customers in the Qwest region. Transmittal No. 206 should accordingly be rejected or, at the very least, suspended and investigated. More fundamentally, the Qwest filing should prompt the Commission to reassess in a comprehensive manner its special access regulatory regime and to replace it with rules that effectively limit ILEC opportunities to engage in anticompetitive pricing behavior.[1]

A. Current Regulation Has Left The ILECs Free To Engage In Unreasonable Pricing Practices In The Provision Of Special Access.

It should now be beyond dispute that ILECs such as Qwest continue to possess sole control over (1) bottleneck end user connections serving the vast majority of commercial office buildings in the United States, and (2) over many of the interoffice transport routes needed by competitors to connect ILEC loops to the competitors' geographically limited transport networks. As TWTC has explained in numerous proceedings, marketplace realities and Commission precedent unambiguously support this conclusion,[2] and there is no reason to repeat that explanation here.

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[1] Any regulatory framework for special access must address ILEC opportunities to engage in both unreasonable price and non-price practices. In this pleading, however, TWTC addresses only pricing issues.

[2] *See, e.g.*, Comments of TWTC, WC Docket No. 04-36 at 5-15 (filed May 28, 2004); Reply Comments of TWTC, WC Docket No. 02-112 at 2-7 (filed Jul. 28, 2003); Comments of TWTC, WC Docket No. 02-112 at 4-8 (filed Aug. 5, 2002); Comments of TWTC, CC Docket No. 01-337 at 10-13 (filed Mar. 1, 2002).

The ILECs' sole control over loops serving commercial buildings as well as over transport has obvious consequences for the special access market. Competitive providers of special access such as TWTC must purchase loop and transport facilities from ILECs as inputs into their own special access service offerings. It is well established that, where an ILEC has a monopoly over an upstream input needed by competitors in downstream markets, the ILEC has powerful incentives to engage in anticompetitive price discrimination in the provision of that input to competitors.[3] For example, the ILECs have the incentive to engage in price squeezes,[4] to lock large customers into long term contracts thus artificially reducing the size of competitors'

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[3] *See Applications of Ameritech Corp., Transferor and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rule*s, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 202 (1999); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 12 FCC Rcd 15756 ¶ 28 (1997) ("*LEC Classification Order*").

[4] The Commission has explained the problem of price squeezes in the context of the long distance market as follows:

> Absent appropriate regulation, an incumbent LEC and its interexchange affiliate could potentially implement a price squeeze once the incumbent LEC began offering in-region, interexchange toll services. . . . The incumbent LEC could do this by raising the price of interstate access services to all interexchange carriers, which would cause competing in-region carriers to either raise their retail rates to maintain their profit margins or to attempt to maintain their market share by not raising their prices to reflect the increase in access charges, thereby reducing their profit margins. If the competing in-region, interexchange providers raised their prices to recover the increased access charges, the incumbent LEC's interexchange affiliate could seek to expand its market share by not matching the price increase. The incumbent LEC affiliate could also set its in-region, interexchange prices at or below its access prices. Its competitors would then be faced with the choice of lowering their retail rates for interexchange services, thereby reducing their profit margins, or maintaining their retail rates at the higher price and risk losing market share.

Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, ¶ 277 (1997) ("*Access Charge Reform Order*"). The ILECs have the incentive to engage in the same conduct where competitive providers of downstream special access services must purchase loops and transport from the ILEC in the upstream wholesale market (either in the form of special access or unbundled network elements). *See LEC Classification Order* ¶ 134 (concluding that ILECs have the incentive to engage in price squeezes).

addressable market,[5] to engage in strategic pricing to harm competitors with limited network footprints,[6] and to engage in cost misallocation.[7]

In order to obtain access to the loop and transport facilities it cannot self-deploy efficiently, TWTC purchases these facilities pursuant to ILEC special access tariffs. Unfortunately, federal special access regulation provides essentially no regulatory constraint on ILEC anticompetitive pricing practices for such inputs. Under the pricing flexibility rules, ILECs are freed entirely from price regulation other than the obligation to file tariffs (without cost support data) when they receive Phase II pricing flexibility. *See Pricing Flexibility Order* ¶ 153. To obtain Phase II pricing flexibility for interoffice transport throughout an MSA, an ILEC need only show that *one* collocated carrier using non-ILEC interoffice transport is present in 50 percent of the wire centers in the MSA or in wire centers representing 65 percent of the ILEC's transport revenues in an MSA. *See Pricing Flexibility Order* ¶¶ 148-149. To obtain Phase II pricing flexibility for special access channel terminations throughout an MSA, an ILEC need only show that one collocated carrier using non-ILEC *transport* is present in 65 percent of the wire centers in the MSA or in wire centers representing 85 percent of the ILEC's channel termination revenues in the MSA. *See id.* ¶ 150.

The Commission adopted these triggers based on its predictive judgment that collocation by a single provider of transport in certain wire center offices would serve as a reliable proxy for sunk investment in competitive facilities that limit the ILECs' opportunities to engage in

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[5] *See Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221, ¶ 79 (1999) ("*Pricing Flexibility Order*") ("An incumbent can forestall the entry of potential competitors by 'locking up' large customers by offering them volume and term discounts at or below cost").

[6] *See Southwestern Bell Telephone Company, Tariff FCC No. 73,* Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, ¶¶ 51-53 (1997).

[7] *See LEC Classification Order* ¶ 10.

exclusionary behavior. But (as experience has shown) this predictive judgment was utterly unrealistic. The problem is most obvious with regard to channel termination loops (the most intractable bottleneck facility). Under the triggers, an ILEC can be freed from all rate regulation applicable to special access loops regardless of whether a single non-ILEC loop has been deployed in an MSA. It need only show that there has been some transport deployed in the MSA. But the deployment of some transport in a geographic area offers no basis at all for determining whether loop facilities will be deployed. TWTC's experience demonstrates that, even in the densest downtown areas where significant non-ILEC transport can be deployed, there are many commercial buildings to which it is impossible to deploy loop facilities because of obstacles associated with building access, access to public rights-of-way, customers' unwillingness to tolerate the delay needed to construct loops, and the relatively small revenue opportunities associated with many downtown customer locations. In those locations (which comprise the vast majority of commercial building locations), Phase II pricing flexibility offers the ILECs' free reign to engage in unreasonable and anticompetitive pricing.[8]

The triggers for special access transport are nearly as flawed as those for special access loops. The obvious problem with the transport triggers is that they free ILECs from price regulation throughout an entire MSA when only a single competitor has deployed transport on a

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[8] The FCC openly acknowledged the flaws in its channel termination triggers in the *Pricing Flexibility Order*:

> As a number of parties indicate, a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC, and so collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises.

Pricing Flexibility Order ¶ 103. Notwithstanding "the shortcomings of collocation as a measure of competition for channel terminations between end offices and customer premises," the Commission decided to use it anyway because "it appears to be the best option available to us at this time." *Id*.

single transport route connecting a fraction of the wire centers in the MSA.[9] Thus, the ILEC may escape rate regulation throughout an MSA where it faces competitive entry on only a tiny fraction of the interoffice routes within that MSA. The FCC subsequently repudiated this approach as entirely inappropriate for assessing ILEC market power in the provision of interoffice transport. As it explained in the *Triennial Review Order*:

> The record indicates that incumbent LECs have qualified for special access pricing flexibility in numerous MSAs throughout their regions, almost exclusively by meeting the triggers based on special access revenues. Because the revenue trigger requires only a single collocated competitor and the purchase of substantial amounts of special access in a concentrated area, this test provides little or no indication that competitors have self-deployed alternative facilities, or are not impaired outside of a few highly concentrated wire centers.[10]

Furthermore, in adopting the pricing flexibility rules, the Commission assumed that ILECs would, in general, be precluded by the triggers from charging special access rates that are significantly above cost because, "[i]f an incumbent LEC charges an unreasonably high rate for access to an area that lacks a competitive alternative, that rule will induce competitive entry, and that entry will in turn drive down rates." *Pricing Flexibility Order* ¶ 144. But the entry barriers associated with facilities deployment often preclude such competitive entry. As a result, as AT&T has demonstrated, the ILECs' special access prices are (in the aggregate) significantly above cost years after the pricing flexibility rules went into effect. *See* AT&T Petition for Rulemaking, RM No. 10593 (filed Oct. 15, 2002) ("*AT&T Petition*"). Above-cost rates offer

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[9] In this regard as well the FCC admitted that its adoption of proxy triggers exposed competition to significant risks. As it explained in the *Pricing Flexibility Order*, "[w]e acknowledge that, because we will evaluate pricing flexibility requests on an MSA basis and do not require the presence of competitive facilities in every wire center in an MSA, there remains a theoretical possibility that an incumbent LEC could use pricing flexibility in a predatory manner to deter investment in competitive facilities in those wire centers where it as yet faces no competition." *Id*. ¶ 83.

[10] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand, 18 FCC Rcd 16978 ¶ 397 (2003) ("*Triennial Review Order*"), *vacated in part, United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

much greater opportunities for price squeezes since the ILEC can charge above-cost prices to itself (*i.e.*, it can continue to make a profit) that are still lower than the prices it charges competitors.

Notwithstanding the Commission's obvious failure to establish adequate regulation for special access *per se*, the Commission appears to have assumed that the existence of separate affiliate safeguards in the in-region long distance business would limit ILECs' opportunities to act on their incentive to discriminate. At the time the *Pricing Flexibility Order* was adopted, the Commission assumed that special access would be purchased by IXCs. "[W]e note that these services generally are purchased by IXCs." *Pricing Flexibility Order* ¶ 155. *See also id*. ¶ 142. The Commission *did not even consider* the possibility that competitive providers of local exchange and special access services would themselves purchase loops and transport from ILECs under special access tariffs. In fact, in explaining why ILECs would be unlikely to exploit pricing flexibility to discriminate unreasonably among special access customers, the Commission emphasized that the "IXCs and large businesses" that purchase special access "generate significant revenues for the incumbent and are not without bargaining power with respect to the incumbent." *Id.* Obviously, competitors such as TWTC lack any such bargaining power. Moreover, the FCC also assumed that ILECs would sell special access to competitors only in markets where the ILECs' own downstream retail offerings were subject to separate affiliate requirements.[11] But of course no such protections apply in the local and special access markets in which the ILECs provide service on an integrated basis.[12]

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[11] For example, the FCC assumed that BOCs would be providing in-region long distance through Section 272 affiliates: "[o]nce the Commission grants BOCs permission, pursuant to section 271 of the Act, 47 U.S.C. § 271, to provide in-region long distance services, they are required to offer those services through separate affiliates." *Pricing Flexibility Order* n.345. Similarly, the Commission relied on the fact that non-BOC ILECs would also be subject to separate affiliate requirements for their in-region long distance service offerings. Throughout the *Pricing Flexibility Order*, the Commission referred to ILEC in-region long distance offerings as provided through

In the absence of either adequate rate regulation governing special access or separate affiliate requirements, the only remotely effective regulatory constraint on ILEC price discrimination in the provision of special access loops and transport has been the availability of such facilities as unbundled network elements. In fact, the FCC has several times relied upon the availability of unbundled network elements as a check on ILEC anticompetitive pricing behavior in the provision of special access.[13] It is not at all clear, however, that loops and transport will continue to be available as unbundled network elements in the aftermath of the D.C. Circuit's decision in *United States Telecom. Assoc. v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). Not surprisingly, ILECs like Qwest are now exploiting this uncertainty by raising the price of special access. Price increases such as those in Transmittal No. 206 leave competitors with a Hobson's choice between (1) paying unsustainably high month-to-month special access rates (exactly the rates that are the focus of the Qwest price increase); (2) agreeing to volume and term commitments needed to obtain a modest discount on the ever-increasing underlying month-to-month rates, thus probably foregoing reliance on cost-based unbundled network elements (should

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"affiliates" (*see, e.g., id*. ¶¶ 129, 134-135). The FCC even established special protections against ILEC price discrimination in the provision special access that are only relevant where the ILEC provides retail service through a separate affiliate. *See id.* ¶ 129 (prohibiting an ILEC from offering a contract tariff to an affiliate unless and until an unaffiliated customer first purchases service pursuant to the contract).

[12] The Commission's decision to allow Section 272 separate affiliates to sunset by operation of the statute without any analysis of the consequences of such action for competition has only expanded the BOCs' opportunity to discriminate in the provision of special access to the in-region interLATA market.

[13] *See Access Charge Reform Order* ¶ 280 (finding that price squeezes are unlikely to succeed in the provision of above-cost access service "so long as an incumbent LEC is required to provide unbundled network elements quickly, at economic cost, and in adequate quantities"); *LEC Classification Order* ¶ 126 (holding that the risk of price squeezes could be addressed by a combination of separate affiliate requirements, price cap regulation of BOC exchange access services and the "ability of competing carriers to acquire access through the purchase of unbundled network elements."); *id*. ¶ 130 ("We agree with commenters that assert that the risk of the BOCs engaging in a price squeeze will be greatly reduced when interLATA competitors gain the ability to purchase access to the BOCs' networks at or near cost. . . . As noted, we believe that the ability of competing carriers to acquire access through the purchase of unbundled elements enables them to avoid originating access charges and thus partially protect themselves against a price squeeze.").

they remain available) or bypass alternatives like WiFi during the term of the commitment; or (3) attempting to rely on unbundled network elements that will likely be partly or entirely unavailable six months from the effective date of the Commission's interim unbundling rules and running the risk that even the modest volume/term special access discounts that are available now will be unavailable in the future.

B. The Rate Increases Proposed In Transmittal Number 206 Are Unreasonable In Violation Of Section 201(b) Of The Communications Act.

TWTC purchases special access from Qwest pursuant to Qwest's so-called "Regional Commitment Plan" ("RCP") under which TWTC receives a 20 percent discount off of month-to-month prices for DS1 and DS3 transport and channel terminations so long as TWTC meets the defined commitment level of circuits in each of the four years of its agreement. Increases in the underlying month-to-month rates to which the 20 percent discount applies thus result in higher special access prices for TWTC.

Transmittal No. 206 includes widespread and dramatic price increases in month-to-month charges. Overall, TWTC estimates that, if allowed to take effect, Transmittal No. 206 would result in an increase of approximately 19 percent in the rates that TWTC pays for special access in the Qwest region. Moreover, the rate increases are likely to have similar consequences for other competitors purchasing service under an RCP.

Specific examples of the rates in Transmittal No. 206 illustrate their dramatic and harmful nature. For example, Qwest proposes to increase its month-to-month prices for DS1 channel terminations by 24.75 percent in zone 1, 21.74 percent in zone 2, and 19.16 percent in zone 3. These rate increases are highly significant because TWTC and other competitors can very rarely self-deploy stand-alone DS1 loop facilities. Qwest's unilateral pricing power is illustrated by the fact that it proposes to increase its rates for these facilities by almost 25 percent even in zone one areas, the lowest cost and likely most densely populated geographic areas in its region.

Qwest has proposed similar increases in the mileage charge for DS1 special access transport. For example, Qwest proposes an increase of 26.48 percent for the mileage charge from 0-to-8 miles throughout its region. This is again highly significant for competitors. Many (perhaps even most) of the interoffice transport routes purchased by competitors like TWTC are shorter than 8 miles because such competitors operate in the relatively dense downtown areas where distances between central offices are short. Concentrating rate increases for DS1 transport (again, a facility that competitors cannot self-deploy when merely used to extend a DS1 loop facility so that it can connect the competitor's transport network) on these shorter distances therefore has a disproportionate effect on competitive providers of special access and local exchange services.

As mentioned, high rates for facilities that competitors rely on as upstream inputs into their own competitive offerings provide the ILECs with easy opportunities to engage in price squeezes and other exclusionary pricing behavior. For example, while increasing the prices paid by TWTC and other competitors, Qwest can negotiate special offers for all of its significant special access retail customers at rates that are below those paid by its competitors for inputs. Such offers can contain poison pills or special eligibility provisions that prevent competitors from taking advantage of them. This strategy obviously places competitors in an untenable position, but, importantly, it does so without forcing Qwest to charge below-cost prices. This is because the prices charged to its rivals are high enough that Qwest can charge retail rates that are below those wholesale rates yet still well above its costs. It is for this reason that the proposed price increases pose a grave risk for competition in the very market in which the pricing flexibility rules are supposed to spur lower prices and greater efficiencies.

The services to which the rate increases apply have all been freed from price cap or any other rate regulation. The Commission's misled deregulatory initiatives have therefore left competitors with no regulatory constraints upon which to rely in challenging the substantial and broadly applicable increases in Transmittal No. 206. Qwest is not even required to submit information regarding the cost of providing the services at issue, leaving competitors only to guess the margins Qwest might earn if the proposed rate increases were to go into effect.

But the regulatory failure that has placed competitors at the mercy of ILEC unilateral exercise of market power must not be compounded by a failure to stop Qwest's proposed rate increases from taking effect. The dramatic size of the increases by itself requires that the Commission reject or at least investigate whether the rates are unjust and unreasonable in violation of Section 201(b). As mentioned, the pricing flexibility regime was founded on the *conjecture* that the presence of a single non-ILEC transport facility collocated in wire centers in an MSA would constrain ILEC market power over the many loop and transport facilities on which it faces no competition. *See Pricing Flexibility Order* ¶ 104. In fact, the Commission guessed that, by the time an ILEC received Phase II pricing flexibility, "almost all special access customers" in an MSA would have "competitive alternative[s]." *Id.*. ¶ 142.

TWTC is exactly the type of company that the Commission was counting on to provide "competitive alternatives" to ILECs throughout an MSA. But TWTC cannot efficiently deploy its own transport facilities outside of the densest metropolitan region and, even within those dense metropolitan areas, its transport network is far from ubiquitous. Moreover, TWTC can only deploy its own loops to serve customer locations with the largest telecommunications needs (and thus the largest revenue opportunities) and even these customer locations are only addressable where, among other things, building access on reasonable terms and conditions is available (as it is often not).

As a result, the ILECs control the *only* transmission facilities along most interoffice transport routes and connecting the vast majority of end user customers in every MSA throughout the country.[14] In the absence of adequate rate regulation, the ILECs will exploit this control over bottleneck prices to charge unreasonable rates and to discriminate against competitors. That is exactly what Qwest proposes to do. Its broad-based rate increases of over 20 percent for DS1 facilities is flatly inconsistent with a market in which "almost all special access customers" in the MSAs in its region have "competitive alternatives." It therefore illustrates that the obvious flaws in the predictive judgments relied upon by the Commission in adopting its pricing flexibility regime.[15]

The Commission has a duty to adjust its regulatory approach when prior predictive judgments prove to be unfounded. An agency's reliance on such predictive judgments carries with it "a correlative duty to evaluate" whether its policies "actually produce the benefits the Commission originally predicted they would." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992). Where, as here, such benefits have not been achieved, the Commission must take action to ensure that ILEC rates conform to the standards established in Section 201 of the

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[14] This is true even in New York City, the MSA with the greatest level of facilities-based entry. The New York PSC concluded that in New York City, "Verizon has 8,311 miles of fiber compared to a few hundred for most competing carriers; Verizon has 7,363 buildings on a fiber network compared to less than 1,000 for most competing carriers." *See* Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, 211 P.U.R.4th 190 (NYPSC 2001). Obviously, the level of facilities-based penetration by competitors is likely to be significantly smaller in less densely concentrated areas, including those in the Qwest region.

[15] Those flaws are further confirmed by evidence that AT&T and other have supplied regarding the broad-based increase in ILEC rates since the adoption of pricing flexibility. *See AT&T Petition* at 8.

Communications Act. *See AFL-CIO v. Brock*, 835 F.2d 912, 917 (D.C. Cir. 1987) ("courts recognize that agencies must respond to changed circumstances to carry out Congress' purposes").

This duty applies with special force to tariff proceedings such as this where the concrete evidence of ILEC pricing behavior is squarely at issue. The Supreme Court has described the requirement that carriers file tariffs as "the heart of the common-carrier section of the Communications Act." *MCI Telecoms. Corp. v. AT&T*, 512 U.S. 218, 229 (1994). Tariff reviews are "Congress's chosen means of preventing unreasonableness and discrimination in charges." *Id.* at 230. Moreover, in adopting the pricing flexibility rules, the Commission retained the requirement that ILEC file their special access rates in tariffs. *Pricing Flexibility Order* ¶¶ 79, 122. Indeed, the continued application of the tariff filing requirement reflects the Commission view that Qwest and other ILECs are still dominant in the provision of special access. The only remaining forum for preventing the abuse of that dominant position is tariff review proceedings such as this one.

The rate increases at issue here are so large that they must be considered an abuse of market power. Under conventional antitrust market definition analysis, a price increase of approximately five percent should prompt customers to purchase substitutes if such substitutes are available.[16] The fact that Qwest now proposes across-the-board rate increases in excess of 20 percent for DS1 facilities demonstrates that it believes there are no available substitutes for those facilities. Moreover, Qwest's proposed rate increases *come after similar increases in prior*

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[16] *See* 1992 Horizontal Merger Guidelines § 1.11 (rev. 1997).

years.[17] All of the available evidence therefore leads inexorably to the conclusion that the rate increases in Transmittal No. 206 are unreasonable and must be rejected or, at the very least, suspended and investigated.

Finally, Qwest's filing must also cause the Commission to initiate a comprehensive reevaluation of its special access regulatory regime. That regime has already been persuasively challenged by AT&T in its petition seeking the elimination of pricing flexibility. *See AT&T Petition*.[18] The D.C. Circuit, which itself upheld the Commission's pricing flexibility rules when initially adopted, has even scheduled AT&T's mandamus petition (seeking a court order mandating Commission action on its petition) for briefing and oral argument before a special merits panel, a relatively unusual step that reflects the seriousness of its concern that the Commission's rules have been a failure. Qwest's proposed rate increases just confirm that this is so and that the time has now come to rewrite the rules for special access rate regulation. Accordingly, the Commission must promptly initiate a proceeding to address the manner in which it should re-impose rate regulation designed to constrain ILECs' abuse of their continued control over bottleneck loop and transport facilities.

III. CONCLUSION

For the foregoing reasons, the Commission should reject the proposed revisions to Qwest's Tariff F.C.C. No. 1 submitted in Transmittal No. 206 as unlawful, or alternatively, exercise its full authority to suspend and investigate the proposed revisions. The Commission

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[17] *See e.g.*, Comments of Worldcom Inc., RM No. 10593 at n.2 (filed Dec. 2, 2002) (noting that in 2002, Qwest filed tariff transmittal No. 145, raising "DS1 rates virtually across the board in pricing flexibility MSAs, density zone 1.").

[18] It is important to point out that, while AT&T raised important problems with the pricing flexibility regime in its petition, its request for the re-imposition of what amounts to rate of return regulation in that petition is, as TWTC has explained, an inappropriate means of addressing those problems. *See* Comments of TWTC, RM No. 10593 at 16-18 (filed Dec. 2, 2002).

must also promptly initiate a proceeding to reexamine in a comprehensive manner the regulatory regime governing special access. The focus of that proceeding must be on imposing new regulation on ILEC special access that appropriately constrains ILEC exercise of market power over transmission facilities. Transmittal No. 206 powerfully illustrates the risks associated with the current lack of regulation. This transmittal will be followed by more and more proposed rate increases from ILECs, and the absence of appropriate price ceilings and other regulations will leave the Commission and competitors in an untenable position when attempting to determine the reasonableness of such increases. Comprehensive rate regulation for ILEC special access is therefore urgently needed, and the Commission must not waste any more time before initiating a proceeding to develop such regulation.

Respectfully submitted,

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ATTORNEYS FOR
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August 23, 2004

CERTIFICATE OF SERVICE

I, Thomas Jones, do hereby certify that copies of the foregoing Petition to Reject, or Alternatively, Suspend and Investigate, were sent *via* first class mail, postage paid, and by facsimile, unless otherwise indicated, to the following on this 23rd day of August, 2004.

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